



UNITED STATES PATENT AND TRADEMARK OFFICE

Commissioner for Patents
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450
www.uspto.gov

PATRICIA A. WENGER
201 NORTH JACKSON STREET
MEDIA PA 19063

COPY MAILED

SEP 20 2007

OFFICE OF PETITIONS

In re Application of :
George Brainard :
Application No. 09/853428 : **DECISION ON PETITION**
Filing or 371(c) Date: 05/10/2001 :
Attorney Docket Number: :
BRA01-NP002 :

This is a Decision in response to the Petition to Revive an Unintentionally Abandoned Application Under 37 C.F.R. § 1.137(b), filed July 16, 2007. The delay in treating this petition is regretted.

Background

The above-identified application became abandoned for failure to timely and properly reply to the non-final Office action, mailed October 24, 2003, and re-mailed November 7, 2003. The Office action set a three (3) month period for reply.

Applicant filed an Amendment on November 10, 2003, and a Notice of Appeal on May 10, 2004; however, Applicant failed to file a brief in support of Appeal. Since no claims were allowed, the application became abandoned for failure to timely and properly reply to the non-final Office action mailed November 7, 2003, on February 8, 2004.

Applicant filed a petition, Request for Continued Examination ("RCE"), a "Request for Reconsideration of Letter Restarting Period of Response Mailed November 7, 2003", and "Supplemental Amendment, Petition and Fee to add Originally Erroneously Named Inventors in Declaration (37 C.F.R. § 1.48(a)", on August 1, 2006. In a Decision mailed January 30, 2007, Petitioner was advised of the requirements for a grantable petition to correct inventorship under 37 CFR 1.48. The Decision referred Applicant's Request for Reconsideration of Letter Restarting Period of Response Mailed November 7, 2003, to the Examiner. The Request for Reconsideration of Letter Restarting Period of Response Mailed November 7, 2003, was referred to the Examiner, who, in a Decision mailed May 10, 2007, dismissed the request.

The petition under 37 CFR 1.137(b)

A grantable petition pursuant to this paragraph must be accompanied by:

- (1) The reply required to the outstanding Office action or notice, unless previously filed;
- (2) The petition fee as set forth in § 1.17(m);
- (3) A statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional. The Director may require additional information where there is a question whether the delay was unintentional; and (4) Any terminal disclaimer (and fee as set forth in § 1.20(d)) required pursuant to paragraph (d) of this section.

Regarding a RCE, an applicant cannot request continued examination of an application until after prosecution in the application is closed. See 37 CFR 1.114(a). Prosecution in an application is closed if the application is under appeal, or the last Office action is a final action (37 CFR 1.113), a notice of allowance (37 CFR 1.311), or an action that otherwise closes prosecution in the application (e.g., an Office action under Ex parte Quayle, 25 USPQ 74, 453 O.G. 213 (Comm'r Pat. 1935)).

In this instance, the application became abandoned for failure to timely and properly reply to the non-final Office action, mailed October 24, 2003, and re-mailed November 7, 2003. As such, prosecution of the application is not closed, and the RCE is not a proper reply to the Office action.

The MPEP further provides that "[i]f prosecution in the application is not closed, applicant will be notified of the improper RCE and any amendment/reply will be entered. Thereafter, the application will be forwarded to the examiner for consideration of the amendment/reply under 37 CFR 1.111. MPEP 706.07(h).

In view of the above, the petition to revive the application is granted. The application is being referred to Technology Center Art Unit for consideration of the amendment filed with the petition on July 16, 2007. A refund of the RCE fee has been scheduled via Treasury Check.

Telephone inquiries concerning this petition Decision should be directed to the undersigned at (571) 272-3232.



Derek L. Woods
Attorney
Office of Petitions